Case Comments

Comparative Negligence and Strict Products Liability: *Butaud v. Suburban Marine & Sporting Goods, Inc.*

The growth of strict products liability as a tort action has provided injured consumers with a powerful weapon against manufacturers and sellers of defective products. The doctrinal basis for strict products liability, its scope of applicability, and its range of potential defenses,[1] however, are continually being defined through litigation. The Alaska Supreme Court in *Butaud v. Suburban Marine & Sporting Goods, Inc.*,[2] contributed to this developing area of tort law by holding that a system of pure comparative negligence is applicable in a strict products liability suit. The Alaska Supreme Court thus became the first jurisdiction to apply a system of "pure" comparative negligence in a strict products liability action.[3] The case invites attention because by uniting comparative negligence theory with strict products liability theory, the court has married an odd couple of tort law. One commentator has remarked: "In essence, those proposing the adoption of comparative negligence in the strict liability action are actually suggesting a comparison of a fault doctrine (comparative negligence) to a no-fault doctrine (strict products liability)."[4] The *Butaud* decision presents a unique opportunity to discuss the conceptual basis for uniting strict products liability theory with comparative negligence thought. This Case Comment will suggest that clear conceptual analysis is essential to any successful marriage of the two theories, and that the concept of fault should be the foundation of their union.

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1. Strict products liability has developed primarily since Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), which first recognized strict liability as the basis for a products liability suit.

2. 555 P.2d 42 (Alaska 1976). This decision is a modification of a prior appeal brought by Butaud, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), in which the court reversed a judgment for the defendant on the ground of an improper instruction on contributory negligence. The Alaska Supreme Court had recently adopted a pure comparative negligence system in Kaatz v. Alaska, 540 P.2d 1037 (Alaska 1975). The court, after briefing by counsel, modified the original *Butaud* holding.

3. The Wisconsin Supreme Court, in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), and a federal district court in New Hampshire, in Hagenbuch v. Snap-On Tools, 339 F. Supp. 676 (D.N.H. 1972), had earlier applied modified comparative negligence systems in strict products liability suits.

4. H. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 351 (1977).

I. THE RISE OF STRICT PRODUCTS LIABILITY AND COMPARATIVE NEGLIGENCE THEORIES

In order to present a clear context for a discussion of the *Butaud* decision, it is necessary to examine the theoretical evolution of the strict products liability action, traditional defenses to that action, and the operation of comparative negligence systems.

A. *Strict Products Liability as a Cause of Action in Tort*

1. *Evolution and Current Developments*

Products liability is a creature of modern society. The advance of the consumer age, coupled with mass production of goods, stimulated the need for an effective cause of action in tort for consumers injured by defective products. Strict products liability had its roots in contract and negligence law, whose traditional actions presented several difficulties to potential plaintiffs. Prior to 1916, a consumer could bring a negligence-based products liability suit only if he stood in contractual privity with the party responsible for the defect. The requirement was subject to the narrow exception that there was no privity requirement necessary to bring an action against merchants and producers of "inherently dangerous" products.[5] Justice Cardozo's landmark opinion in *MacPherson v. Buick Motor Co.*[6] released products liability actions from the restrictive chains of the privity requirement by permitting a direct negligence action by an owner of an automobile against its manufacturer. Prosser writes of *MacPherson*: "[I]ts reasoning and its fundamental philosophy were clearly that the manufacturer, by placing the car upon the market, assumed a responsibility to the consumer, resting not upon the contract, but upon the relation arising from his purchase, together with the foreseeability of harm if proper care were not used."[7] *MacPherson* effectively expanded the category of products for whose defectiveness direct suits could be brought to include products "reasonably certain to place life and limb in peril when negligently made."[8] Without the restrictive requirement of privity, products liability suits became basic negligence actions involving an analysis of whether the defendant was under a duty to avoid exposing the plaintiff to an unreasonable risk of harm, and whether the defendant breached that duty in such a manner to produce actual damage or loss.[9]

Gradually, attempts were made to expand liability beyond neg-

5. Poisons and explosives are two examples of products in this category.
6. 217 N.Y. 382, 111 N.E. 1050 (1916).
7. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 643 (4th ed. 1971).
8. 217 N.Y. at 389, 111 N.E. at 1053.
9. W. PROSSER, *supra* note 7, § 30, at 143-45.

ligence theory to embrace a concept of strict liability independent of negligence analysis. The law of warranty provided the original basis for the development of strict products liability theory.[10] The theory was that a manufacturer or seller expressly or impliedly warranted the safety of the product. Once this warranty was breached, the consumer had a cause of action in contract.[11] The consumer, however, faced a difficulty with using warranty theory: the availability of complicating contractual defenses.[12] Prosser writes: "[I]t gradually became apparent that 'warranty', as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications and is more trouble than it is worth."[13]

The evolution of a strict products liability cause of action in tort was fostered by a growing consumer consciousness.[14] The theory of "enterprise liability", *i.e.,* that the manufacturer is in the best position to absorb the loss sustained as a result of the injury from a defective product, also became accepted. It was thought that since the manufacturer creates the risk, profits from it, and is in the best position to distribute the loss, he is the party most responsible for the injury.[15]

Greenman v. Yuba Power Products, Inc.,[16] decided by the California Supreme Court in 1962, was the first case to recognize strict products liability as an independent cause of action in tort. Widespread acceptance of this decision led to the formal recognition of strict products liability in the Restatement (Second) of Torts.[17] Following the Restatement's recognition of strict products liability as a cause of

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10. *See* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

11. *See* J. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968). Levine states that since a breach of warranty action is a form of absolute liability, the necessity of proving negligence is bypassed: "In an action for breach of warranty, the buyer must prove the existence of the warranty, breach of the warranty, reliance on the warranty, loss or injury resulting from the breach, and breach of the warranty as the proximate cause of the loss sustained." *Id.* at 628 (footnotes omitted).

12. Notice of the defective condition at the time of purchase or disclaimer of the warranty by the seller or manufacturer were typical defenses.

13. W. PROSSER, *supra* note 7, § 98, at 656.

14. J. Levine, *supra* note 11, at 130.

15. W. PROSSER, *supra* note 7, § 97, at 651.

16. 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

17. RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of the product and,

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

action in tort, the various elements of the tort evolved through judicial decision. Shortly after the Restatement's adoption of section 402A, a fundamental debate arose concerning what a plaintiff had to prove in order to recover. The Restatement requires that the plaintiff prove not only that a defect exists, but also that the product be "unreasonably dangerous."[18] The California Supreme Court, however, expressly rejected the Restatement approach in *Cronin v. J.B.E. Olson Corp.*,[19] holding that the plaintiff need only prove the existence of a defect that proximately caused the injury.[20] Neither approach requires the plaintiff to prove that the defect was created through an act foreseeable to the defendant.

The position taken by the California Supreme Court in *Cronin* was that the Restatement, by associating the defect requirement with the requirement that the product be shown to be "unreasonably dangerous," burdened the "injured plaintiff with proof of an element which rings of negligence."[21] That court argued that the very purpose of the strict products liability action was "to relieve the plaintiff from problems of proof inherent in pursuing negligence."[22] Thus, the California approach may be seen as an attempt to purge the strict products liability cause of action of any elements of culpability or fault in the negligence sense. Indeed, the same court in *Ault v. International Harvester Co.* stated: "In an action based upon strict liability against a manufacturer, negligence or culpability is not a necessary ingredient. The plaintiff may recover if he establishes that the product was defective, and he need not show that the defendants breached a duty of care."[23]

The controversy over the defect requirement may be traced to a fundamental uncertainty underlying strict products liability theory—namely, whether the concept of "defect" carries with it any implications of fault. If fault is a necessary element of the defendant's conduct in a strict products liability suit, the question arises whether strict products liability theory is still related somehow to negligence theory.[24]

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18. *Id.* For a recent case upholding the Restatement position, see Bendix-Westinghouse v. Latrobe Die Casting Co., 427 F. Supp. 34 (D. Colo. 1976).

19. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

20. *Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

21. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

22. *Id.*

23. 13 Cal. 3d 113, 118, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1975).

24. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965) asserts:

> Thus, the test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the Restatement. . . .
>
> It may be argued that this is simply a test of negligence. Exactly. In strict liability, except for the element of defendant's *scienter*, the test is the same as that for negligence.

2. *Defect and Fault: The Relationship Between Negligence Theory and Strict Products Liability Theory*

The California approach to strict products liability actions has been characterized as a "no-fault" theory of products liability.[25] It is possible, however, that the court's disassociation of the "unreasonably dangerous" requirement from the products liability action, may not have purged strict products liability theory of all elements of fault.

Fault is a much misunderstood concept that pervades tort law. Fault is often confused with moral culpability, carelessness, ignorance and stupidity.[26] Prosser defines fault as "a failure to live up to an ideal of conduct to which no one conforms always and which may be beyond the capacity of the individual."[27] Fault in the negligence context inheres in subjecting the injured party to an "unreasonable risk" of harm. Whether such a risk is unreasonable depends upon a balancing of various competing criteria. The foreseeability to the defendant of the harm, its seriousness, and the value of protecting the plaintiff from physical and emotional damage must be weighed against the value of the defendant's conduct and the availability to the defendant of alternative courses of conduct.[28] If the balance is tipped against the defendant, society declares him to be at fault and thus responsible for the loss.

The California approach to strict products liability reveals the fear that by requiring the plaintiff to prove the existence of an "unreasonably dangerous" product, negligence theory creeps into the strict products liability action through the concept of fault. The California courts wish to relieve the plaintiff of the necessity of proving fault by a traditional balancing of the elements of unreasonable risk. Yet, easing the plaintiff's burden of proof does not necessarily dissociate elements of fault from strict products liability theory. It may remove only the necessity for *proving* fault. Whether or not a product is unreasonably dangerous, fault may inhere in the very idea of a defective product itself.

The concept of defect lies at the heart of strict products liability theory, yet it is rarely analyzed by courts and is the source of much confusion.[29] The law imposes strict liability on the manufacturer or seller who has released an unsafe product into the stream of commerce. To call a product "defective" is to judge it lacking of a standard of safety and quality that is acceptable to society. If fault is defined in

25. H. Levine, *supra* note 4, at 337.

26. W. PROSSER, *supra* note 7, § 75, at 492-94.

27. *Id.*, § 75, at 493.

28. *Id.*, § 31, at 145-49.

29. For an excellent discussion of problems relating to the concept of defect, see Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977).

Prosser's sense of failing to meet an ideal or standard imposed by society, then a defective product clearly reveals the fault of the defendant in not producing or selling a product that meets acceptable standards.[30] Although in a strict products liability action the plaintiff need not prove that fault, nevertheless it makes sense to ascribe fault to the defendant's conduct. Professor Twerski has written: "In this imperfect world it is not an outrageous inference that a bad defect most probably stems from serious fault—even if the fault need not nor cannot be established."[31]

If fault inheres in the very idea of defectiveness, then strict products liability theory is indeed related to negligence theory, although the theories have their own identities. It may legitimately be argued that establishing a standard of product acceptability—lack of defectiveness—necessitates an analysis of the seriousness of the potential harm to the consumer, the value of protecting him from physical and emotional damage, the value of the defendant's conduct, and the availability to the defendant of alternative courses of conduct. In short, it may be said that the elements of fault inhere in the manufacture and marketing of a defective product—that is, one that presents an unreasonable risk of harm—even though foreseeability of harm, and thus a hallmark of negligence is absent. It thus becomes clear that fault can serve as a theoretical ground for interrelating strict products liability theory and negligence theory. That theoretical ground becomes crucial when comparative negligence principles are employed in a products liability action.

B. *Traditional Defenses to Strict Products Liability Suits*

Although strict liability provides an efficient and powerful cause of action for consumers against the merchants of defective products, the cause of action is not so broad that it makes the manufacturer or seller an absolute insurer of its product.[32] Certain defenses may still be raised in a strict products liability action. The defense of general contributory negligence, in the sense of a negligent failure to discover the defect in the product, is not available.[33] The Restatement, however, permits a defense based upon a knowing and willful encounter with a known defect, and use of the product after such knowledge is obtained. The Restatement refers to this defense as the assumption of risk type of contributory negligence.[34]

In addition to assumption of risk, unforeseeable misuse of the

30. Those standards may be drawn from the particular industry or business of the defendant, from government, or society in general.

31. Twerski, *supra* note 29, at 326.

32. J. Levine, *supra* note 11, at 631.

33. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n at 356 (1965).

34. Assumption of risk and contributory negligence are technically different defenses.

product may be a defense to a strict products liability action. Both the Restatement[35] and the courts[36] have recognized that if the plaintiff alters or misuses the product in a manner not foreseeable by the defendant, and such misuse causes the injury, a defense may be raised.[37] However, the defendant is not insulated from liability if: "(1) [t]he injury was caused by a defect in the product and not the admittedly abnormal use to which it was subjected; or (2) [t]he injury was caused by a defect in the product during use that was reasonably foreseeable."[38] Thus, misuse is intimately tied to the issues of defect and causation.[39] Before the misuse defense will lie, the causal effects of the unforeseeable conduct of the plaintiff must supersede the causal effects of the defective product. When that occurs, the plaintiff's misuse bars recovery, making the defect irrelevant.

The misuse defense, however, is not equivalent to a general defense of contributory negligence. Misuse is a "term of art," requiring a double foreseeability test. Before the plaintiff's use of the product can be labeled misuse, the use is subjected to a "reasonable consumer" test of foreseeable harm, a particular form of negligence that involves a "use of handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it."[40] Once a breach of that standard is shown, the further question arises whether the plaintiff's conduct was fore-

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Assumption of risk consists of the assumption by plaintiff of the risk of defendant's negligence. Contributory negligence is the commission of a negligent act by the plaintiff. Contributory negligence and assumption of risk overlap. Plaintiff may reasonably or unreasonably assume the risk of defendant's negligence. Unreasonable assumption of risk is a form of contributory negligence in which plaintiff's negligent act is the voluntary encounter with a known risk and subsequent use of the product with that knowledge. The Restatement continues the modern trend of blurring unreasonable assumption of risk with contributory negligence. *See* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LOUISIANA L. REV. 122 (1961); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93, 119-28 (1972).

35. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h at 351 (1965) reads: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap . . . the seller is not liable."

Section 395, Comment j at 330 reads:

> The liability stated in this Section is limited to persons who are endangered and the risks which are created in the course of uses of the chattel which the manufacturer should reasonably anticipate. In the absence of special reason to expect otherwise, the maker is entitled to assume that his product will be put to a normal use . . . and he is not subject to liability when it is safe for all such uses, and harm results only because it is mishandled in a way in which he has no reason to expect, or is used in some unusual and unforeseeable manner.

36. For a recent misuse case, see General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1976).

37. *See* Dale and Hilton, *Use of the Product—When is it Abnormal?* 4 WILLAMETTE L.J. 350 (1967); Noel, *supra* note 34, at 119-28.

38. Dale and Hilton, *supra* note 37, at 352.

39. The issue of causation involves an analysis of proximate causation and causation in fact. Those concepts are discussed in the text accompanying notes 74-76 *infra*.

40. Findlay v. Copeland Lumber Co., 265 Or. 300, 306, 509 P.2d 28, 31 (1972).

seeable to the defendant. If the conduct was foreseeable, no defense lies even though elements of misuse from the standpoint of the plaintiff's reasonable expectations may be present.[41]

The policy of restricting defenses in strict products liability suits is related to the concept of enterprise liability, which imposes the loss on the manufacturer in the vast majority of cases. In situations, however, in which the plaintiff's fault in causing the injury is predominant, it is recognizably unjust to force the defendant to absorb the loss. Thus, egregious fault on the part of the plaintiff makes the defenses of assumption of risk and misuse available, barring the plaintiff's recovery.

C. *The Rise of Comparative Negligience Theory*

The doctrine of comparative negligence involves apportionment of damages based on each party's negligence in causing the injury. Like strict products liability, comparative negligence is of relatively recent origin. Comparative negligence has evolved as an alternative to the harsh effects, in the form of a potential total bar to recovery, that contributory negligence has upon a negligent plaintiff.[42] At present, thirty-four American jurisdictions have adopted some form of comparative negligence thereby replacing the traditional defense of contributory negligence.[43] Thirty have done so by statute and four have done so by judicial decision.[44]

There are three basic types of comparative negligence systems. The first is a system of "pure" division of damages,[45] in which the fault of the plaintiff and the defendant are weighed against each other and damages are apportioned accordingly. Under a pure comparative negligence system, the plaintiff's conduct can never constitute a total bar to recovery. The second type of comparative negligence allows a plaintiff to recover if his negligence is "not greater than" that of the defendant.[46] Under this system, a plaintiff is barred from recovery if he

41. *See* Dale and Hilton, *supra* note 37, at 382.

42. W. PROSSER, *supra* note 7, § 67, at 433; V. SCHWARTZ, COMPARATIVE NEGLIGENCE 3-5 (1974); Annot., 78 A.L.R. 3d 339 (1977).

43. Those jurisdictions are Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Puerto Rico. South Dakota, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* 45 U.S.C. §§ 51-55 (1970). *See* notes 45-48 *infra* for citations to the relevant cases and statutes.

44. The four that have done so by judicial decision are Alaska, in Kaatz v. Alaska, 540 P.2d 1037 (Alaska 1975); California, in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Florida, in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); and Michigan, in Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977).

45. *See* Kaatz v. Alaska, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977); MISS. CODE ANN. § 11-7-15 (1972); N.Y. CIV. PRAC. LAW § 1411-13 (McKinney Supp. 1976); R.I. GEN. LAWS § 9-20-4 (Supp. 1974); WASH. REV. CODE ANN. § 4.22.010-019 (Supp. 1976).

46. *See* CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1978); MONT. REV. CODES ANN.

is fifty-one percent or more at fault for the accident. The third type of comparative negligence allows a plaintiff to recover if his negligence is "not as great as" that of the defendant.[47] Under this system, a plaintiff is barred from recovery if he is fifty percent or more at fault for the accident. The remaining jurisdictions follow slightly different approaches.[48]

D. *Pre*-Butaud *Application of Comparative Negligence Systems to Strict Products Liability Actions*

The applicability of comparative negligence systems to a strict products liability cause of action has generated much debate. Whether there is a basis for comparing the conduct of the parties may depend on the jurisdiction's theory of strict products liability. Where strict products liability is a no-fault cause of action, there will be no measure of defendant's fault with which to compare the plaintiff's negligence.[49] When strict products liability contains elements of fault, the conduct of both parties can be analyzed with reference to fault.[50]

Some comparative negligence statutes are expressly limited to negligence based actions, and the courts have refused to extend these statutes to embrace a strict products liability suit.[51] Other jurisdictions have refused to apply comparative negligence to strict products liability actions because of a fear of jury confusion in allocating damages.[52] Comparative negligence has been applied, however, in strict liability cases arising under the admiralty concept of unseaworthiness,[53] in

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§ 58-607.1 (Supp. 1977); NEV. REV. STAT. § 41.141 (1973); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1973); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon Supp. 1978); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (West Supp. 1977).

47. *See* ARK. STAT. ANN. § 27.1763-65 (Supp. 1975); COLO. REV. STAT. § 13-21-111 (Supp. 1976); GA. CODE ANN. § 105-603 (Supp. 1977); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (Supp. 1977); KAN. STAT. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1977); MASS. ANN. LAWS ch. 231 § 85 (Michie/Law. Co-op Supp. 1974); MINN. STAT. ANN. § 604.01 (West Supp. 1978); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1977); OR. REV. STAT. § 18.470 (1975); UTAH CODE ANN. § 78-27-37 (1977); WYO. STAT. § 1-7.2 (Supp. 1975).

48. *See* IOWA CODE ANN. § 327D.188 (West Supp. 1977) (limited to railroad actions); NEB. REV. STAT. § 25-1151 (1975) (slight v. gross negligence); P.R. LAWS ANN. tit. 31, § 5141 (Supp. 1976) ("concurrent guilt"); S.D. COMPILED LAWS ANN. § 20-9-2 (Supp. 1977) (slight v. gross negligence).

49. *See* H. Levine, *supra* note 4, at 355; Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

50. *See* J. Levine, *supra* note 11, at 652; Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1975); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

51. *See* OKLA. STAT. ANN. tit. 23, § 11 (West Supp. 1977); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

52. *See* Kinard v. Coats Co., 553 P.2d 835 (Colo. 1976); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law).

53. *See* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1938); The Max Morris, 137 U.S. 1 (1890); Allbritton, *Division of Damages in Admiralty: A Rising Tide of Confusion*, 2 J. MAR. L. & COMM. 323 (1971).

which a plaintiff's misconduct is not an absolute bar to recovery, but may be considered in mitigation of damages as justice requires.[54]

Two courts have permitted comparative negligence to be applied in strict products liability cases. In *Dippel v. Sciano*,[55] the Wisconsin Supreme Court applied the state's "not greater than" statute to a products liability suit. In so doing, the court justified its comparison of the conduct of the parties by analogizing strict products liability to negligence per se.[56] Under the negligence per se rationale, the defendant's act of placing a defective product on the market is conclusively presumed to be negligence or is negligence as a matter of law.[57] Since the defendant's conduct is a form of negligence, it becomes susceptible to comparison with the plaintiff's negligent action.[58]

A federal district court in New Hampshire declined to accept the negligence per se rationale of the Wisconsin Supreme Court, but applied the New Hampshire comparative negligence (not greater than) statute in a products liability action in *Hagenbuch v. Snap-On Tools Corp.*[59] Under New Hampshire law, contributory negligence was a defense in a strict liability action. Since contributory negligence had been completely replaced by the comparative negligence statute before *Hagenbuch* was decided, the court felt obligated to apply comparative negligence in the strict products liability suit. Courts in several other jurisdictions have indicated their willingness to apply comparative negligence in strict products liability cases should the occasion arise.[60] Thus, the stage was set for the decision in *Butaud.*

II. THE FACTS AND HOLDING IN *Butaud*

James Butaud purchased a Ski-Doo Olympic snowmobile from the defendant's store in 1968. He subsequently sustained a severe eye injury as the result of an accident that occurred while he was racing the snowmobile around a track. Butaud brought a products liability action, alleging that his injury was caused by the shattering of a defective pul-

54. Comparative negligence has also been used as a defense in a suit based upon the wanton, willful, or reckless conduct of the defendant. As with strict liability cases, comparative negligence is used to compare arguably divergent types of conduct *See* Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966). *Contra*, Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976); Annot., 78 A.L.R. 3d 339, 350 (1977).

55. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

56. *Id.* at 461, 155 N.W.2d at 64.

57. For a recent case adopting the negligence per se rationale, see Ford Motor Co. v. Carter, 141 Ga. App. 371, 233 S.E.2d 444 (1977).

58. *See* Dippel v. Sciano, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 64: "Comparison of the failure to exercise ordinary care and negligence per se is so common and widely approved in our jurisdiction as to need no citation."

59. 339 F. Supp. 676 (D.N.H. 1972).

60. *See* Sun Valley Airlines, Inc. v. Avco Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Chapman v. Brown, 198 F. Supp. 78 (D. Haw.), *aff'd*, 304 F.2d 149 (9th Cir. 1962); Ettin v. Ava Truck Leasing, Inc., 100 N.J. Super. 515, 242 A.2d 663 (1968), *aff'd*, 53 N.J. 463, 251 A.2d 278 (1969).

ley guard. Butaud testified that prior to the accident he had inspected the drive belt and found no signs of excessive wear.[61]

The defendant contended that the cause of the accident was Butaud's negligence in the use and care of the snowmobile. The defendant's expert witness testified that the drive belt had been worn beyond safe levels, and that the machine had not been properly maintained by Butaud. Butaud admitted on cross examination that he had failed to follow instructions in the maintenance manual and that he had failed to return the machine for inspections. Butaud further admitted that the snowmobile had not been sold to him as a racing model, and that a conversion kit was necessary before racing the snowmobile was possible.[62] On these facts, the case was submitted to a jury, which returned a verdict for the defendant.[63]

Butaud appealed, alleging that an instruction by the court on the applicability of contributory negligence in a products liability suit was overbroad.[64] His argument was that *Bachner v. Pearson*,[65] which held that a contributory negligence instruction in a products liability action must be limited to situations in which the plaintiff knew of the defect and proceeded voluntarily and knowingly to use the defective product, controlled the case. The Supreme Court of Alaska agreed and reversed the lower court's judgment, holding that the defense of contributory negligence "is limited to those occasions where the use concurs with knowledge of the particular defect, not the general negligence of the user as established in this case."[66]

During the course of Butaud's appeal, the Alaska Supreme Court adopted a system of pure comparative negligence to replace the old defense of contributory negligence.[67] The court modified its original disposition of *Butaud* by declaring comparative negligence applicable not only in strict products liability cases in which the plaintiff uses the product with knowledge of the defect, but also in cases in which the plaintiff's misuse of the product is a proximate cause of the injuries sustained.[68] In announcing its decision, the court recognized that it was "breaking new ground" in the products liability area, and justified its decision by stating: "[W]e feel that the public policy reasons for strict

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61. Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 210 (Alaska 1975).

62. *Id.*

63. *Id.* at 211.

64. The disputed part of the instruction read: "Defendants claim that plaintiff was contributorily negligent, in their defense of this action. Contributory negligence, if proven, is a complete defense, and bars recovery by the plaintiff, upon the theory that one should not profit from his own wrongdoing." *Id.* at 211 n.1.

65. 479 P.2d 319 (Alaska 1970). The plaintiff also relied upon Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

66. 543 P.2d 209, 212 (1976).

67. Kaatz v. Alaska, 540 P.2d 1037 (Alaska 1975).

68. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976).

product liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct."[69]

III. Analysis of Comparative Negligence and Strict Products Liability in *Butaud*

The Alaska Supreme Court in *Butaud* became the first court to apply a pure comparative negligence system in a strict products liability suit. An examination of the decision and its potential effects reveals the necessity for a rigorous analysis of the relationship of the theories in their conceptual and policy dimensions. That analysis will suggest the extent to which the theories should be united.

A. *The Scope of the* Butaud *Decision*

The Alaska Supreme Court modified its original holding in *Butaud* by declaring that comparative negligence would be applicable "if the appellee can establish that the appellant's racing of the snow machine and/or lack of maintenance of the machine was comparative negligence which contributed to his injuries."[70] The court, retreating from its earlier holding, recognized that misuse of the product as well as assumption of risk was an assertable defense in a strict products liability suit: "The defense of comparative negligence is not limited to those cases where the plaintiff uses the product with knowledge of the defective condition, but also extends to those cases where the plaintiff misuses the product and that misuse is a proximate cause of his injuries."[71] By the second *Butaud* decision, then, the court had established that neither of the traditional defenses could be a complete bar to the plaintiff's recovery. Under Alaska's pure comparative negligence system, plaintiff's award would be "reduced in proportion to [his] contribution to his injury."[72]

In that second decision, however, the court proceeded to analyze the misuse defense in such a fashion that confused the traditional sense of the concept. The court seemingly eschewed the connection of negligence elements with the misuse defense when it wrote: "We realize that there is some dispute among commentators concerning foreseeability of misuse of products as it affects the doctrine of products liability. However, we are not convinced that the doctrine of foreseeability provides a viable conceptual basis upon which to predicate a

69. *Id.* at 46.
70. *Id.* at 47.
71. *Id.* at 46.
72. *Id.*

defense in products liability cases."[73] The court then stated that "proximate cause" was the basic issue in a products liability suit.[74]

The court failed, however, to explain how proximate cause was the primary issue when a misuse defense was raised to a products liability claim. Proximate cause is a much abused concept in tort law and it is often used inappropriately to describe what actually is physical causation or causation in fact. Causation in fact is best described by means of a "but for" test; but for the actions of the party, would the harm have resulted?[75] Proximate cause, on the other hand, involves a prior question of whether the actor is under a duty of care to the injured party. Professor Green has written:

> But the term "proximate cause" is defined as requiring "foreseeability or anticipation of some harm" as the result of defendant's conduct. This gives a context of fault or some other form of wrongdoing, and destroys or at least overshadows the simple idea of cause and effect. . . . Causal relation never of itself determines or imposes liability. The elements of wrongdoing and damages must also be present.[76]

Thus, when the Alaska Supreme Court embraced proximate cause as the main issue in a products liability suit, and indicated that elements of foreseeability must be dissociated from the misuse defense, it apparently meant that the main issue in the application of the misuse defense is causation in fact. Otherwise, it would have been reintroducing elements of foreseeability and fault into the misuse defense, thereby contradicting its earlier position that foreseeability is not involved in strict products liability actions.

If causation in fact replaces foreseeability as the main issue in the application of the misuse defense, then misuse as a term of art becomes very confused. Recall that misuse in the traditional sense is bound by two dimensions of foreseeability.[77] Foreseeability is first involved from the plaintiff's perspective. Would a reasonable consumer expect the snowmobile to withstand the use to which it was subjected by him? Then foreseeability is involved from the defendant's perspective. Should the defendant have foreseen the racing of the snowmobile by the consumer? If the court has dissociated these two elements of foreseeability from the misuse defense, then the identity of that defense is completely obliterated.

The Alaska Supreme Court's analysis arguably leads to the conclusion that comparative negligence is available as a defense in a strict

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73. *Id.*

74. *Id.* The court cited Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975) as authority.

75. *See* W. PROSSER, *supra* note 7, § 41, at 238-39.

76. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 475 (1950).

77. *See* text accompanying notes 40-41 *supra*.

products liability suit whenever the plaintiff's actions cause a part of his injuries. It no longer makes sense to call the plaintiff's conduct misuse or assumption of risk since those restrictive defenses are now expanded to embrace all of the plaintiff's negligent conduct that is a physical cause of the injury. Indeed, the dissenting opinion of Justice Burke stated that the court may have made general contributory negligence available as a defense in a strict products liability suit: "Today, in an apparent about face, the majority concludes that such 'general negligence' will, however, permit a reduction of the award an injured consumer might otherwise recover."[78]

Though the court's reasoning may aid the plaintiff by using some version of comparative negligence to remove assumption of risk and misuse as complete bars to recovery, it also aids the defendant by expanding the availability of defenses to strict products liability suits. Indeed, plaintiffs may wonder if the removal of a potential complete bar to recovery is worth the expanded scope of defenses assertable by the defendant. If one policy goal of strict products liability is to place the loss on the manufacturer because he can best absorb it, then Justice Burke correctly perceived that: "Clearly, this underlyng [*sic*] policy will be given little effect if a plaintiff is to be held responsible for his own injuries, to the extent that those injuries are caused by his own ordinary negligence, when he is not aware of the defect and the dangers associated with that defect."[79] The majority nevertheless concluded that use of comparative negligence in a strict products liability suit "can serve to substantially ameliorate the harshness of contributory negligence while balancing the seller's responsibility to the public with the user's conduct in contributing to his injury."[80] Whether the court is correct in its assessment of the value of using comparative negligence in the strict products liability context requires an analysis of how the theories interrelate in both their conceptual and policy dimensions.

B. *Comparing the Conduct of the Parties: Causation Versus Fault*

The majority in *Butaud* believed that the union of comparative negligence and strict products liability theories was justified by an essential compatibility of policy goals.[81] Indeed, the court declared that the underlying legal theory behind products liability was not germane to the introduction of comparative negligence theory into a strict products liability suit:

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78. 555 P.2d at 47 (Burke, J., dissenting).

79. *Id.*

80. *Id.* at 46.

81. *Id.*

> We find it unnecessary to conceptualize the theory of the action which strict liability creates in order for us to apply comparative negligence principles to strict product liability cases which result in personal injuries. Whether the action is characterized as negligence, warranty, or in tort, the plaintiff must prove essentially the same elements to recover.[82]

This statement by the court is misleading[83] for if the conduct of the parties is to be compared, that comparison must proceed upon some conceptual basis. Thus, the basis of the defendant's liability becomes relevant when such a comparison takes place. If the strict liability of the defendant is to be compared with the negligence of the plaintiff, how is this to be achieved in a logically consistent fashion? The court maintained that:

> [W]e are mindful of the theoretical argument that the strict liability of the defendant is difficult to compare with the contributory negligence of the plaintiff. There is a problem of measuring the parties' contribution to the injury because there is little or no evidence of the actual conduct of the seller to compare with the evidence of the conduct of the plaintiff.[84]

The court's only attempted answer to the problem of comparing the conduct of the parties rested in its analysis of causation.

In discussing the misuse defense, the court indicated that causation was the focal point for the analysis of defenses to strict products liability actions. Alaska follows a California no-fault approach to strict products liability theory, and assumes that strict liability is independent of negligence theory.[85] More precisely, in those jurisdictions, strict products liability analysis does not openly recognize the elements of fault associated with the concept of "defect."[86] Since the court believed that fault was unavailable as a conceptual basis for comparing the conduct of the parties, it turned to causation as a solution: "The defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury."[87] In the words of Justice Rabinowitz, who concurred in the majority's decision on this point:

> Perhaps it is only a semantic difference rather than reflective of a true functional distinction but I prefer the adoption of a comparative causation analysis in strict liability cases. Thus, I would require the trier of fact

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82. *Id.* at 45.

83. Professor Levine states: "This statement does not demonstrate a fundamental awareness of the significant disparities among varied theories of recovery. Bald assertions which conclusively abandon essential differences in theories of liability should never serve as a method of resolving important legal issues." H. Levine, *supra* note 4, at 355 (footnote omitted).

84. 555 P.2d at 43.

85. The court expressly announced this doctrine in the first Butaud appeal. Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975).

86. *See* text accompanying notes 25-31 *supra.*

87. 555 P.2d at 46.

> to compare the harm caused by the product's defect with the harm caused by the claimant's own negligence. . . . Adoption of a comparative causation approach would avoid the theoretical problems inherent in any attempt to compare relative degrees of fault where the defendant's negligence, or fault is determined by principles of strict liability.[88]

The court's displacement of foreseeability in favor of a causation in fact approach to the misuse defense is superficially plausible in light of Alaska's no-fault approach to strict products liability theory. If pure physical causation replaces foreseeability as the issue in products liability actions, then the fault elements of the plaintiff's conduct can be ignored, and thus will no longer clash with the no-fault basis of the defendant's strict liability. The question remains, however, whether the use of comparative negligence in strict products liability actions on the basis of physical causation makes conceptual sense and furthers justice in products liability actions.

The conceptual difficulty with using physical causation as the basis for uniting strict products liability and comparative negligence theory is that it obliterates the identity of comparative negligence theory: if fault is irrelevant from the standpoint of both the plaintiff and the defendant, then it is difficult to see what remains of that theory, which divides damages on the basis of the parties' respective culpability.

Nor is comparative causation truly compatible with the policy goals of strict products liability. First, enterprise liability, as a policy basis behind strict products liability, is downplayed when met by a defense that the plaintiff's fault is so great that placing the loss on the defendant would be unjust. If fault is replaced by pure physical causation analysis, the area of plaintiff's misconduct susceptible to comparison with the conduct of the defendant is greatly expanded, and certain anomalous situations could arise. In some circumstances, the fault of the plaintiff may be small, but his actions will physically cause a great portion of his injury. For example, a plaintiff may not be negligent for failing to discover the defect in his snowmobile, but his actions in racing it, even for just a few seconds, may be the physical cause of his accident. It is thus questionable whether eliminating fault from consideration in products liability cases will reach just results in the majority of cases especially when the defect remains latent and is only triggered by the plaintiff's actions. If the loss is placed increasingly on the plaintiff under a causation analysis, the policy of enterprise liability will be severely restricted. The loss may not, in many situations, be put on the party best able to bear it, but on the party who physically, but perhaps innocently, causes more of the injury.

Comparative causation also raises other difficulties. How is the

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88. *Id.* at 47 (Rabinowitz, J., concurring).

trier of fact to sort through the various potential causes of an injury and arrive at a quantitative assessment of how the loss should be allocated? The court may have been engaged in wishful thinking when it asserted: "It is not anticipated that the trier of fact will have serious difficulties in setting the percentage that the damages would be reduced as a result of the comparative negligence of the plaintiff."[89] It is not clear why such a procedure is so simple, and courts may find quantifying causation to be difficult, if not impossible, especially in situations in which a variety of causes combine to produce an injury.

It is clear then that if causation is used to arrive at the parties' respective liability in a products liability action, the integrity of comparative negligence theory is destroyed and injustice may result in some cases. The question then becomes whether comparative negligence can be used in a strict products liability suit in such a fashion that it preserves the conceptual integrity of the two theories while furthering the interests of justice.

From a conceptual standpoint, comparative negligence can be used successfully in a strict products liability suit if fault is chosen as the basis for comparing the conduct of the parties. Despite the protestations of courts in "no-fault" jurisdictions, the concept of fault is involved in strict products liability theory in two essential ways. First, the concept of defect implies fault on the part of the defendant. The defendant is at fault for placing a product into the stream of commerce that does not meet an acceptable standard of safety or quality.[90] Second, the recognition of the traditional defenses of assumption of risk and misuse means that it is fault that ultimately circumscribes the area of defendant's liability. Indeed, if fault on the part of the plaintiff could traditionally absolve a defendant of liability, why can it not do the lesser task of reducing it? One commentator has remarked: "The doctrine of comparative fault, when viewed as a tool of justice, is readily available without either distorting the law of products liability or returning us to the neanderthal doctrine of contributory negligence as a complete bar."[91]

How then would a system of pure comparative fault operate in a strict products liability action? The fault of the plaintiff would be assessed through a traditional negligence analysis. For example, the jury would be asked to consider whether the racing of the snowmobile presented a foreseeable risk of serious harm to the plaintiff, that could not have been avoided by alternative forms of conduct. The fault of the defendant would be assessed through an analysis of the defectiveness of his product, since the plaintiff need not prove that the defect was cre-

89. *Id.* at 46.

90. *See* text accompanying notes 25-31 *supra.*

91. Twerski, *supra* note 29, at 331.

ated by negligence. For example, the jury would be asked to consider whether the defendant's defective pulley guard met a standard of acceptable safety and quality. To the extent that the snowmobile failed to meet acceptable standards, the jury would assign fault to the defendant. The defendant's fault would thus relate to the degree of his product's defectiveness, which in turn is assessed by analyzing the seriousness of the harm to which the plaintiff was exposed, the value of protecting the plaintiff from such harm, and the burden of alternative courses of conduct for the defendant. The jury would then be asked to weigh the degree of the plaintiff's fault with the fault of the defendant and assign a percentage to each. The damages would then be divided accordingly.

Even if pure comparative fault is used in a strict products liability cause of action, the question of the extent to which it should apply remains. The traditional defense of assumption of risk may be retained intact except that a complete bar to plaintiffs recovery will be removed. The fault associated with the plaintiff's willful encounter with a known defect is compared with the fault of the defendant in placing the defective product into the stream of commerce.

Application of comparative fault becomes more complicated with respect to the misuse defense. Professor Schwartz has advocated the retention of unforeseeable misuse as a complete bar to the plaintiff's recovery.[92] Thus, where the defendant cannot foresee the misuse, the plaintiff's actions completely supersede the product's defect, and there is no basis on which to ascribe fault to the defendant for purposes of comparison with the plaintiff's misuse. But when the misuse is foreseeable to the defendant, a strong argument can be made for comparing the conduct of the parties.[93] Since foreseeability is involved from the perspective of both sides, the trier of fact merely weighs the fault of the plaintiff in subjecting the product to a use that a reasonable consumer could not expect the product to withstand, against the fault of the defendant in releasing a product unable to withstand such a foreseeable misuse.

From a policy standpoint, the abolition of a complete bar to recovery in the assumption of risk defense furthers justice by holding the defendant at least partly responsible for his defective product. Justice may be served by retaining unforeseeable misuse as a complete bar because the defendant's fault is superseded in that the plaintiff's extreme fault makes the defect in the product irrelevant. Comparing fault in situations of foreseeable misuse furthers justice by holding both parties responsible for results that they could anticipate. It should be noted that in each of the situations just mentioned, the strict liability

92. V. SCHWARTZ, *supra* note 42, at 180-81.

93. *Id.*

policies of inducing the defendant to improve his defective product, and of holding him responsible for the risk he created are consistent with making the plaintiff responsible for his own contribution to his injury. The theory of enterprise liability will be partly or wholly restricted just as it has traditionally been wholly restricted when the plaintiff's conduct has constituted a defense to strict products liability.

The question remains whether comparative fault should be used as the Alaska Supreme Court used comparative causation, to make the general negligence of the plaintiff susceptible to comparison with the defendant's conduct.[94] The answer to this question, since the policies of product improvement and responsibility for risk are roughly consistent with comparative fault, depends on the desirability of the policy of enterprise liability in cases in which the plaintiff's fault is not great. Enterprise liability serves the interests of justice in these situations by placing the loss on the party best able to bear it. Although the plaintiff may be partially at fault for the injury, enterprise liability insures that the defendant, who also is responsible, and who is usually in a stronger financial position, bears the loss. Thus, as a policy matter, comparative fault should not be used to expand the area of plaintiff's loss of recovery beyond the traditional defenses of assumption of risk and unforeseeable misuse, and foreseeable misuse.

In addition to the foregoing conceptual and policy advantages of using comparative fault, other advantages attend a comparative fault system. First, the effect of a discrepancy between fault and physical causation is avoided and the loss is assessed through relative degrees of culpability. Second, it is arguably easier to measure comparative degrees of fault than comparative degrees of physical causation; the former task is in any event more familiar to American courts.

IV. CONCLUSION

Although the Alaska Supreme Court claimed to be applying comparative negligence theory in the strict products liability action in *Butaud*, close analysis reveals that the court was really using comparative causation to allocate damages in what it believed to be a just manner. The court's opinion suffers from a lack of proper use of conventional terminology as well as a lack of any substantive analysis of the issues underlying both comparative negligence and strict products liability theories. The result is that the court does not make a successful marriage of the two theories, and through its comparative causation analysis, it may have undermined the policy goal of enterprise liability

94. Professor Schwartz would allow a comparison of the parties' conduct in cases in which the plaintiff failed to discover or foresee dangers that a reasonable man would have discovered. *Id.*

underpinning strict products liability theory. Successful marriage of comparative negligence theory to strict products liability requires a fault-based analysis that protects the integrity of both theories while furthering the interests of justice. The successful application of a comparative negligence system in a strict products liability action awaits a court willing to wrestle with complex and often divergent concepts and policy goals.[95]

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95. As this article was going to press, California became the second jurisdiction to apply pure comparative negligence principles to strict products liability actions. *See* Daly v. General Motors Corp., 575 P.2d 1162, 144 Cal. RPTR. 380 (1978).